

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

April 2007

School Clubs: Proceed with Caution

Students wishing to form student clubs with questionable intentions be aware—a new state law prevents nefarious plots.

For all other student clubs, there are a few new hoops to jump through.

House bill 236 by Rep. Aaron Tilton, R-Springville, copies the State Board rule on student clubs, with

some notable additions and changes.

The bill, for instance, eliminates the current three-tiered designation of clubs. Instead of "sponsored," "monitored," and

"school" clubs, schools may approve either "curricular" or "noncurricular" clubs.

A curricular club must be related to the curriculum taught at the school. These are the only clubs allowed in elementary schools under the law (districts may want to rethink current policies).

A non-curricular club is a student-initiated club with a faculty supervisor (approved by the school). The school provides access to the club, but does not endorse its activities or message in any way.

All clubs must submit applications containing information required in the law, such as a budget, to the school. A club must

also assure the school that it will not promote bigotry, encourage criminal or delinquent conduct, or present information in club meetings in violation of Utah law on sexual education, related to the use of contraceptives, or advocating sex outside of marriage or forbidden by law.

Clubs must also submit the preferred name. In a section of the law ripe for legal challenge, the school may approve the name, or not. The school can reject a name if it finds the

name would "imply a violation" of the law. This standard could be challenged.

Schools may reject or limit club access to maintain order at the school, protect the well-being of students and faculty, protect the rights of parents and students, and "maintain the boundaries of socially appropriate behavior" (another standard that may be too vague to survive a legal challenge).

In another legally uncertain provision, the law prohibits a faculty supervisor of a non-curricular religious club from participating in club activities. This language is contrary to court prece-

dent on this exact issue.

Clubs that receive school approval to exist must then obtain written parental consent from all club members. The content of the consent form is spelled out in the law. The school is then responsible to keep track of the signed parental consent forms for all students in all clubs.

Schools are also responsible to investigate any allegations that a club has violated the law and provide sanctions against an offending club or an individual who brings a false allegation against a club.

The senate sponsor of the bill made several public statements that the bill was designed to prevent Gay-Straight Alliances in schools. Administrators should be clear, however, that nothing in the language of the law prevents such a club on its face. Schools should be very careful not to reject a club based solely on personal objections to club names or suspected content.

In light of the new law, State Board staff will recommend to the Board that it repeal the clubs rule. Districts should review current policies to ensure compliance with the law.

A chart outlining the differences between the law and the rule is available on our website at www.schools.utah.gov.

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UPPAC CASES

- The Utah State Board of Education did not take any action involving educator licenses during its April Board meeting. This is a rare occurrence resulting from the cancellation of the March Utah Professional Practices meeting.
- The Board will act on educator licenses at its May Board meeting.

Eye On The Supreme Court

The U.S. Supreme Court has agreed to hear three school law cases in its current term.

Two of the cases involve First Amendment issues, the third addresses special education.

In Tennessee Secondary School Athletic Ass'n v. Brentwood, the court will review a Sixth Circuit decision that overturned a high school activities association recruiting rule.

The ruled prohibited the use of undue influence in the recruitment of student athletes. A private high school sued after it was sanctioned for contacting newly-enrolled students in its school about spring football practice, claiming application of the rule violated the school's right to free speech.

The Sixth Circuit agreed with the private school. The Supreme Court will now determine if the voluntary recruiting rule of a voluntary association should be

treated the same as any other "time, place, or manner" restriction on speech and if the Sixth Circuit conducted an appropriate balancing test between the association's interests and those of the school.

The second speech case, <u>Morse v.</u> <u>Frederick</u>, involves the suspension of a student for speech off school property.

The court will determine whether a school board and principal could suspend a student for holding a banner reading "Bong Hits 4 Jesus" across the street from the high school.

The principal had released all students from school to watch the Olympic Torch Relay. The student and his banner were caught by national TV crews filming the event. The principal witnessed the unfurling and display of the banner and suspended the student.

The Ninth Circuit ruled against the principal and school board,

finding that speech occurred at a non-curricular event only partially supervised by the school and did not interfere with educational activities. The Court also ruled that the principal did NOT have qualified immunity since she should have known the student's speech was protected.

The Supreme Court will decide whether a public school can prohibit students from displaying messages promoting illegal drugs at faculty-supervised events. It will also be asked to rule on the qualified immunity issue.

The final case, <u>Winkleman v.</u>
<u>Parma City School Dist.</u>, again involves the Sixth Circuit. The Circuit Court ruled that parents could not represent themselves in federal IDEA court proceedings.

The Supreme Court will determine whether and under what circumstances non-lawyer parents can represent themselves in IDEA litigation.

UPPAC Case of the Month

Even great educators can find themselves in "interesting" or trying situations. A truly great educator manages the situation with aplomb; others may not act as professionally.

For example, an educator was confronted with a rather revealing picture of a student. The educator had confiscated the student's cell phone and discovered the provocative nude photo. A cursory search of the phone revealed other nude photos of the student in what he termed "Penthouse-esque" poses.

Not wanting to know that much about the student, the educator turned the phone off and gave it back to the student with the warning that if he saw it out again, she would not get it back.

The educator's actions seem rea-

sonable, but there is a better response to this situation. Per state law, educators must inform parents when they know of a health or safety emergency facing a student. A student taking nude photos of

herself and storing them on her cell phone could face such a situation.

The educator's response to the photo on the phone would be improved by taking the phone to the principal and calling the student's parents to inform them of the content. The school

should not release the phone back to the student but require that the parents pick it up, giving them the opportunity to further review the files on the phone for any other inappropriate activities.

Most school personnel are familiar with the term *in loco parentis*,

though few may understand exactly what it means. One meaning is that teachers will act as a reasonable parent. A reasonable parent would not hand the phone back to his child without further discussion, or to someone else's child without letting the parents know what happened.

The teacher should NOT have the discussion with the child about the inappropriate sexual nature of her actions. But he or she should give the parents the opportunity to have that talk by letting them know what the teacher knows.

The teacher's initial response in this situation will not lead to a state licensing investigation. But it is an example of the ethical dilemmas teachers deal with every day, and the high standard of care they are expected to exhibit toward students.

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Recent Education Cases

Riccio v. New Haven Bd. of Educ., (Conn. D. Ct. 2007): A student could proceed to trial on her claims of gender based discrimination based on persistent harassment by her peers.

During the student's 8th-9th grade years another female student daily called her "gay," "lesbian," and similar names. The female harasser encouraged her friends to do the same and would throw papers or other items at the student.

The two students met in joint counseling sessions in an attempt to mediate the situation. The harasser would call the student names in the sessions and threaten physical harm. School counselors discontinued the sessions because of the conduct of the harasser.

The student sued, claiming Title IX discrimination.

The school board moved for summary judgment on the lawsuit, claiming the harassment the student suffered was not severe, pervasive or objectively offensive, that it was not gender based, and that the student was not denied any educational opportunities because of the harassment, as indicated by her high grades.

The court disagreed, finding that

daily taunting before, during and after school by female students could be pervasive and that the taunting was based on gender since it centered on allegations of homosexuality. The court also ruled that a jury could find that the student was denied educational opportunities because she was taunted in class and counseling services were discontinued

rasser's conduct in the sessions.

based on the ha-

Straights and Gays for Equality v. Osseo Area Schools, (8th Cir. 2006): The 8th Circuit ruled that a school had to provide equal access to school resources to a student group promoting tolerance and respect for gay, lesbian, bisexual and transgendered students as it gave to cheerleading and synchronized swimming.

The school had designated cheerleading and synchronized swimming as curricular clubs, claiming the clubs were related to physical education courses.

The court disagreed, finding that the clubs were non-curricular since neither involved a subject regularly taught in P.E., the clubs were not required and did not result in academic credit.

Thus, since the school permits cheerleading and synchronized swimming to use the public address system and be featured in the yearbook, it must provide

Straights and Gays for Equality with equal access to those means of communication.

<u>Voss v. Elkhorn Area</u> School Dist., (App. Wisc.

2006): A school could be liable for injuries sustained by a student based on the school creating and maintaining a "known and compelling danger."

The student was injured while wearing "fatal vision goggles." The goggles mimic the effects of alcohol and were used in a health class.

The health teacher knew that students would stumble and fall while wearing the goggles, but chose to conduct the exercise in a classroom with a hard tile floor and metal desks.

The court found that governmental immunity did not apply where the teacher created the danger to the student.

Your Questions

Q: We are taking our children out of school for a 2 week vacation. We consider the trip to be educational and have received all of their homework for the time we will be gone. The school administrator, however, has told us that our children will be dropped from the charter school because they will be gone for more than 10 days. May a charter school un-enroll my student, with no guarantee that we will be readmitted to the program, for a scheduled absence?

A: Probably not, depending on

What do you do when. . . ?

school policy. Students who have UNEXCUSED absences for 10 consecutive days must be dropped from the rolls for funding purposes. However, a student with an excused absence for a verifiable length of time cannot be kicked out of the school or off the rolls.

If planned vacations are considered excused absences under the

school policy, the students should be allowed back to school upon their return.

To maintain the funding, however, the school must work actively with parents and students. The school should provide meaningful homework, monitor the absence and follow through with the parents and students after the absence.

Q: Can we expel a student for name calling if we have a zero tolerance policy against it?

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The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of Education provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions Cont.

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A: It depends on a number of factors.

While zero tolerance policies send a strong message, many examples exist of the follies of taking the policies to the extreme (think of the many public humiliations school districts have suffered after expelling students for possessing butter knives or a kindergartner for kissing another kindergartner).

Zero tolerance must be tempered with common sense given the particular circumstances. Case law consistently supports this approach.

If a student is calling another by an epithet or racial slur on a daily basis, and the student has been progressively disciplined, expulsion may be warranted.

If the student has called another a less-offensive but annoying name once or twice, expulsion is probably not warranted.

In between these extremes lie the hardest cases. If the student is using objectively offensive terminology, persistently violates school policies and has been disciplined on more than one occasion, the school may consider expulsion.

Utah law permits expulsion for "frequent or flagrant willful disobedience, defiance of proper authority, or disruptive behavior, including the use of foul, profane, vulgar, or abusive language"

U.C. § 53A-11-904(1)(a).

This law requires that the school meet several elements, and does not obviate the need to provide the student with due process before expelling or suspending him.

First, the school must prove that the behavior is "frequent or flagrant." These are not defined terms, but a court will not look kindly on a decision to expel a student for a minor, one time infraction.

The school must next prove that the behavior is "willful"—a student with Tourette's, for example, would not meet this standard if the behavior is symptomatic of the disease.

The school must also show that the behavior involved disobedience or defiance (is there a school policy? Has the student been disciplined before for the same action?) or that the behavior is disruptive

(has it led to fights, does the teacher have to constantly interrupt lessons to deal with the student?).

Finally, the school must show that the language is "profane, vulgar or abusive."

The school must also provide the student with notice of the reasons he or she is being suspended or expelled and an opportunity to present his or her side of the story, including witnesses.